IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 25TH SEPTEMBER 2007 / 3RD ASWINA 1929

WA.No. 1637 of 2007

(AGAINST THE JUDGEMENT IN WPC.1296/2007 DATED 29TH MAY, 2007)

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APPELLANTS: PETITIONERS:

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1. K.P. HAMSA,
   S/O. LATE SAIDALI HAJI,
   KALLIPALATHINGAL HOUSE,
   PATTIKKAD AMSOM,
   PERINTHALMANNA TALUK,
   MALAPPURAM DISTRICT.

2. C. MUHAMMED,
   S/O. CHAKKARATHUDIYIL KUNJAPPA HAJI,
   THENKARA, MANNARKKAD,
   PALAKKAD DISTRICT.

3. K. ABDU,
   S/O. KUNJAYAMMU,
   KOLASSERY HOUSE,
   THENKARA, MANNARKKAD,
   PALAKKAD DISTRICT.

BY ADV. SRI.T.KRISHNAN UNNI
SRIC.M.MOHAMMED IQUABAL

RESPONDENTS: RESPONDENTS:

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1. ASSISTANT COMMISSIONER OF SALES TAX
   (ASSESSMENT), PALAKKAD.

2. DISTRICT COLLECTOR,
   PALAKKAD.

3. TAHSILDAR,
   MANNARKKAD,
   PALAKKAD DISTRICT.

4. M/S. MARVAL INDUSTRIES
THROUGH THE MANAGING PARTNER,
SRI.SUBRAMANIAN, VANNAMADA,
CHITTOOR.

5. K. ABDUL SAMAD,
KAPPOOR HOUSE,
P.O. THENKARA, MANNARKKAD,
PALAKKAD DISTRICT.

6. K.P. MUHAMMEDALI,
KULUKKAMPARA HOUSE,
P.O. THENKKARA,
MANNARKKAD,
PALAKKAD DISTRICT.

BY GOVERNMENT PLEADER SRI.K.B.PRADEEP.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 25/09/2007,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

H.L.DATTU C.J. & K.T.SANKARAN, J.

W.A. No. 1637 of 2007

Dated this the 25th day of September, 2007

JUDGMENT

Sankaran, J

1. The questions involved in this Writ Appeal are: (1) To attract Section 26-A of the Kerala General Sales Tax, is it necessary that a demand for collection of arrears of Sales Tax be made? (2) Whether the assignees of an assessee under the Kerala General Sales Tax Act, which transaction is hit by Section 26-A, could claim that they are bonafide transferees so as to avoid the rigour of Section 26-A ? (3) Whether before Revenue Recovery sale, the person in possession could be directed to vacate the house in the property sought to be sold?

2. The parties are referred to hereunder as per their rank in the Writ Petition. The 4th respondent firm, M/s Marvel Industries, is an assessee under the Kerala General Sales Tax Act. Respondents 5 and 6 are the partners of the firm. The counter affidavit filed by the Assistant Commissioner (law) holding the charge of the Joint Commissioner (Law), Department of Commercial Taxes, in the Writ Appeal reveals that the 4th respondent firm is liable to pay a sum of Rs. 90,91,837/- as Sales Tax for the assessment year 1992-93, penalty of Rs. 41,00,000/- for 1992-93, Rs. 2,51,56,900/- for 1993-94 and penalty of Rs. 2,87,00,000/- for 1993-94.

3. The factory of the 4th respondent was inspected by the Sales Tax officers on 20-4-1993, 22-6-1993,18-8-1993 and 21-1-1994. Proceedings for assessment of Sales Tax were initiated on the basis of the inspection held on 21-1-1994. Notices were issued by the Intelligence Officer to the firm directing them to appear and produce the books of accounts on 21-1-1994, 10-2-1994, 17-2-1994, 3-3-1994, 18-3-1994 and 25-3-1994. They failed to

appear on these dates.

4. The petitioners claim that they are the assignees of properties from respondents 5 and 6. The first petitioner claims that he purchased 2.82 acres of land in May 1994 as per registered assignment deed No. 2870/94. The 2nd petitioner purchased 4.49 acres as per registered document Nos. 2832/94, 2848/94 and 2881/94. The third petitioner is an assignee of an extent of 0.31 acres from the 5th respondent. The assignment deeds referred to above were executed either by the 5th respondent or the 6th respondent on 28-5-1994, 30-5-1994 and 31-5-1994.

5. To recover the Sales Tax arrears from the 4th respondent, Revenue Recovery proceedings were initiated. The properties now claimed by the petitioners were attached. The petitioners filed three suits before the Sub Court, Ottapalam praying for a declaration that the properties are not liable to be proceeded against for recovery of Sales Tax arrears due from the 4th respondent. But those suits were subsequently withdrawn. Thereafter, when the properties were proclaimed for sale, the petitioners filed O.P. No. 23617 of 2002. The said writ petition was disposed of as per Exhibit P1 judgment dated 30-5-2006 directing the Tahsildar to dispose of the claim petitions filed by the petitioners under Section 46 of the Kerala Revenue Recovery Act. The learned Single Judge who disposed of the writ petition held thus: "The Tahsildar will call for the records from the concerned sales tax authority for verifying the date of inspection of the factory. If he finds that the sale was effected in favour of the petitioners during pendency of any proceedings under the Sales Tax Act including pendency of finalization of any assessment or penalty he will declare the sale deeds subject to Sections 26 A and 26 B, K.G.S.T. Act and proceed to sell the properties by virtue of Section 21 of the K.G.S.T.Act as transaction by partners are also hit by the said Sections of the K.G.S.T.Act."

6. The Tahsildar heard the petitioners and passed Exhibit P2 order dated 19-9-2006 and rejected the claim made by the petitioners. The Tahsildar held that the sale deeds in favour of the petitioners were executed during the pendency of the assessment proceedings for 1992-93 after the inspection of the factory on 21-1-1994 and therefore the sale deeds under which the petitioners claim title are void under Sections 26 A and 26 B of the Kerala General Sales Tax Act. The Tahsildar also issued notices dated 13-12-2006 (Exhibits P3 and P4) to respondents 5 and 6 to vacate the houses in the properties. Exhibits P2 order and the notices referred to above were challenged by the petitioners in W.P. (C) No. 1296 of 2007. The learned Single Judge dismissed the Writ Petition holding that the transfers in favour of the petitioners are hit by Section 26 A of the K.G.S.T.Act. The Writ Appeal is filed challenging the judgment of the learned Single Judge.

7. The contentions raised by the petitioners are that they are bonafide purchasers, that the transfers in their favour were effected before the sales tax assessment was made against the 4th respondent firm, that any transfer effected by the assessee before the demand made for realization of arrears of sales tax would be valid and that the petitioners are in possession of the properties. They also contend that the notices to vacate the houses are quite illegal. In the counter affidavit filed by the third respondent, the Tahsildar, apart from stating the facts to support Exhibits P2 to P4, it is stated thus:

> "Though the defaulter transferred their properties to the petitioners, the possession of the properties are still with the defaulters. The 5th respondent Sri. K.Abdul Samad resides in the house which he transferred to the 3rd petitioner Sri. K.Abdu. The 6th respondent Sri. K.P. Muhammadali resides in the house which he transferred to the 2nd petitioner Sri. C.Muhammed. Sri. Hamsakutty, Kapoor House, Thenkara, Mannarkkad resides in the house which was purchased by first petitioner Sri. K.P.Hamsa from the fifth respondent. Hamsakutty is the brother of fifth respondent. The petitioners are not in possession of the above properties."

8. Section 26 A of the K.G.S.T.Act reads thus:

> "Where during the pendency of any proceedings under this Act or after the completion thereof, any assessee creates a charge on, or parts with the possession (by way of sale, mortgage, gift, exchange or any other mode of transfer whatsoever), of any of his assets in favour of any person, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee under this Act."

The constitutional validity of Section 26 A was upheld by the Division Bench in **Jaya Vs. State of Kerala: 2005 (2) K.L.T. 543.** It was held that Section 26 A was introduced by the State Legislature to get over the attempt of the assessee to create a charge on the properties or to transfer his properties to defeat any claim in respect of any tax or any other sum payable by him.

9. To attract Section 26A, it is not necessary that the assessment should be completed. It is also not necessary that a demand should be made to the assessee to pay any amount. If the transfer is made by the assessee during the pendency of any proceedings, such transfer shall be void as against any claim in respect of any tax or any other sum payable by the assessee under the K.G.S.T.Act. Inspection of the shop, factory or business premises of the assessee by the sales tax officers would also come within the meaning of the expression "during the pendency of any proceedings" under Section 26A. The transfer as such is not void. It would be a valid transfer as between the transferor and the transferee. But it would be void against any claim in respect of any tax or any other sum payable by the assessee-transferor under the Act. The transferee is not entitled to put forward any defence that the transfer was made for valid consideration or that he is a bonafide purchaser for value. Such defences are outside the purview of Section 26A of the Act. Once the ingredients of Section 26 A are attracted, the

transfer made by the assessee would be void. The transferee cannot claim any valid title in such cases as against "any claim in respect of any tax or any other sum payable by the assesee" under the K.G.S.T. Act. In the present case, the transfers were effected after proceedings were initiated against the assessee under the Act. Therefore, the assignment deeds executed by the partners of the assessee firm in favour of the petitioners are void under Section 26A. Exhibit P2 order is valid and the learned Single Judge has rightly rejected the contentions raised by the petitioners.

10. The petitioners challenge Exhibits P3 and P4 notices as well. As per these notices, respondents 5 and 6 were directed to vacate the houses in the property. According to the petitioners, they are residing in the houses in the properties in question. No notices were issued to the petitioners to vacate the houses. Notices were issued to respondents 5 and 6. They have not challenged the same. The properties were attached under Section 36 of the Kerala Revenue Recovery Act. The next step is sale of the properties under Section 49 of the Act. To effect a revenue recovery sale, it is not necessary that the person in possession of the attached property should be evicted. After the sale and the confirmation thereof, the purchaser's name shall be registered under Section 56 of the Act and the Collector shall grant a certificate of sale to the purchaser. Before the grant of the certificate of sale, the Collector shall cause a publication of the name of the purchaser as provided under Section 57 (1) of the Act. Sub Section (2) of Section 57 provides that registration of the certificate of sale under the Indian Registration Act, 1908 shall be insisted upon in case the purchaser requests that he may be put in possession of the land. Section 58 confers powers on the Collector to effect delivery of possession of the property to the purchaser as if the immovable property had been decreed to the purchaser by a decision of a civil court. Under Section 58 (2) of the Revenue Recovery Act, the Collector is competent to exercise all the powers of a civil court under the Code of Civil Procedure, 1908. It is true that Section 37 of the Act empowers the Collector to

assume the management of the property attached. Section 38 can be invoked by the Collector to appoint an agent for the management of the property in respect of which management is assumed under Section 37. In the instant case, powers under Sections 37 and 38 were not invoked. On the other hand, respondents 5 and 6 were directed to vacate the houses. We hold that Exhibits P3 and P4 notices cannot be implemented against the petitioners. However, it is made clear that this will not preclude the respondent concerned from initiating steps under Sections 37 and 38 of the Revenue Recovery Act after notice to the petitioners. Therefore, Exhibits P3 and P4 notices, as against the petitioners, shall be kept in abeyance till appropriate proceedings under Section 37 of the Kerala Revenue Recovery Act are initiated or until the sale is finalized as per the Act, whichever event occurs earlier.

11. Accordingly, the Writ Appeal is partly allowed as above in so far as it relates to the challenge against Exhibits P3 and P4 and dismissed for the rest. No order as to costs.

12. In view of the orders passed in the writ appeal all pending interlocutory applications are closed.

(H.L.DATTU)
CHIEF JUSTICE

(K.T.SANKARAN)
JUDGE

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